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Nasruddin bin Mohamad v Ketua Pegawai Eksekutif, Majlis Agama Islam dan Adat Melayu Terengganu & Ors

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COURT OF APPEAL (PUTRAJAYA) — APPEAL CIVIL NO T-01(A)-378–08 OF 2020
HANIPAH FARIKULLAH, RAVINTHRAN AND ABU BAKAR JAIS JJCA
26 OCTOBER 2022

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Administrative Law — Judicial review — Application for — Appellant's urine tested positive for drug — Third respondent issued show cause letter to appellant pursuant to r 7 of Public Officers (Conduct and Discipline) Regulations 1993 with a view of dismissing him from service — Appellant terminated based on public interest — High Court dismissed appellant's judicial review application — Whether there was certification by government medical officer as required under r 7 of Public Officers (Conduct and Discipline) Regulations 1993 — Whether there was non-compliance of rr 7, 37 and 49 of Public Officers (Conduct and Discipline) Regulations 1993 — Whether there were illegality and procedural impropriety by respondents in terminating appellant's service based on public interest — Whether Public Officers (Conduct and Discipline) Regulations 1993 applicable to third respondent — Whether there was delay in filing application for judicial review — Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 s 45 — Public Officers (Conduct and Discipline) Regulations 1993 rr 7, 37 & 49 — Rules of Court 2012 O 53

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The appellant was an administrative assistant in the Majlis Agama Islam dan Adat Melayu Terengganu ('the third respondent'). He attended a briefing regarding preparation for retirement in which he was subjected to a urine test together with other attendees by Agensi Anti Dadah Kebangsaan. His urine test was confirmed positive for the drug, methamphetamine but he was never prosecuted in court for the alleged use of this drug. Despite that, the third respondent issued a show cause letter to him pursuant to r 7 of the Public Officers (Conduct and Discipline) Regulations 1993 ('Regulations 1993') with a view of dismissing him from service but later or, he was instead terminated based on public interest. On appeal to the Disciplinary Appeal Board ('the second respondent'), the third respondent's decision in terminating the appellant based on public interest was maintained via a letter signed by the chief executive officer of the third respondent ('the first respondent'). The appellant then challenged his dismissal by way of judicial review application pursuant to O 53 of the Rules of Court 2012 ('the ROC'), but the application was dismissed by the learned High Court judge ('the HCJ'), hence, the present appeal. The appellant submitted that: (a) there was no certification by a government medical officer that he was using or consuming a dangerous drug

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as required by r 7(1) and/or (2) of Regulations 1993; (b) there was procedural non-compliance by the third respondent in failing to conduct the disciplinary proceedings in accordance with the relevant written law; and (c) the appeal was decided by the third respondent when it was supposed to be determined by Disciplinary Appeals Board (the second respondent), as such, this was procedural impropriety, unlawful, an illegality and an excess of jurisdiction. On the other hand, the third respondent submitted that they were in a position to act in a flexible manner pursuant to s 45 of the Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 ('the Terengganu Enactment') whereby they could adopt and use Regulations 1993 with modifications. The respondents had filed a cross-appeal on the ground that the judicial review should not have been granted by the HCJ because the appellant was late in his application for judicial review, in contravention of O 53 r 3(6) of the ROC, which required the application to be made within three months from the impugned decision.

Held, allowing the appeal, and setting aside the HCJ's decision with costs for the appellant:

(1) Since the third respondent itself referred to Regulations 1993 in the show cause letter to initiate the disciplinary action, the third respondent should therefore satisfy the requirements of that subsidiary legislation. The requirement of r 7(2) of Regulations 1993 was that there must be a certification in a prescribed form by a medical government officer as to the use and consumption of the drug by the appellant but in the present case, there was no such certification. The said certification was a prerequisite before the third respondent could initiate the disciplinary action. Without the same, the third respondent could not even begin a disciplinary action based on r 7(2) of Regulations 1993, let alone to terminate the appellant's service based on r 7(3) of Regulations 1993. For the same reasons, the decision to maintain the termination of the appellant's service after his appeal could not stand (see paras 39–40 & 42).

(2) The court disagreed with the respondents' argument that it could instead use a chemist report to certify that the appellant was using the drug because the chemist was defined as a 'medical officer' pursuant to the Dangerous Drugs Act 1952 ('the DDA'). A chemist could not be considered as a government medical officer pursuant to r 7(3) of Regulations 1993. The appellant also was not prosecuted in the court pursuant to any provisions of the DDA. Thus, the status or position of the chemist in the DDA was of no relevance to the termination of the appellant's service based on public interest (see para 46).

(3) The non-compliance with the procedure under r 7 of the Regulations 1993 was both an illegality and procedural impropriety. As the third

respondent did not adhere to the procedure required in the actions and steps it had taken against the appellant, the court found that appellate intervention was warranted to correct the wrong that had been done to the appellant (see paras 47 & 50).

(4) The third respondent should not be allowed to change its position arbitrarily at the expense of the appellant. This was because, by issuing the show cause letter towards taking disciplinary action pursuant to r 7 of Regulations 1993, the third respondent had provided the appellant with legitimate expectation that it was with a view of dismissing him from service and not terminating his service based on public interest. It was well-entrenched that the concept of legitimate expectation was applicable in judicial review. The failure of the HCJ in addressing the change in position by the third respondent which infringed the appellant's legitimate expectation was inappropriate and fatal (see paras 53–55 & 59).

(5) With the issuance of the show cause letter by the third respondent, there were procedures that must be followed pursuant to Part V of Regulations 1993 ie, r 37 of Regulations 1993 in taking disciplinary action. There was no dispute these procedures were not followed by the third respondent when it unjustifiably abandoned its intention to dismiss the appellant from his service and took the easy way out by terminating the appellant's service based on public interest instead. This was another instance of procedural impropriety, as such, the appellant's appeal should also be allowed based on this reason (see paras 60–63).

(6) The court was of the view that r 49(5) of Regulations 1993 was no authority to say the right of hearing must necessarily be denied. This was because the provision only stated such right may not be given. It did not categorically indicate in any manner that right must not be accorded in all circumstances. It envisaged a situation there could still be deserving cases where the officer affected by that decision should not be deprived of the right of being heard. Especially in the present appeal where the appellant was never charged in court and found guilty on the alleged use of the drug (see paras 65–66).

(7) In order for the respondents to rely on r 49 of Regulations 1993, there were several conditions that must be fulfilled. Subregulation (1) indicated that it was the government that had a right to terminate the service of an officer in the public interest. The government in this regard could not mean any of the respondents here. The government here meant the Malaysian Government or Terengganu Government. In order for the officer to be terminated of his service, there must be sufficient reasons which could only be shown by way of the mandatory report by the Head of Department. It was undisputed that the respondents did not have this mandatory report to support the action of terminating the appellant's

service in public interest. Therefore, this was another instance of procedural impropriety, justifying the appeal to be allowed by the court (see paras 73–75).

(8) Sub-regulation (2) of r 49 stated that the report must be elaborate and not a simple report devoid of essential particulars. Even if the report was supplied, under sub-reg (3), the government would have to be satisfied that, having regard to the conditions of the service, the usefulness of the officer to the service, the work and conduct of the officer and all the other circumstances of the case, it was desirable in the public interest to terminate the service of the appellant. Further, under sub-reg (4), there was a requirement for the disciplinary authority to recommend to the government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings had not been carried out under any of the provisions of the regulations. It was undisputed that there was no such recommendation made by any of the respondents in the present case. There was no dispute that all these requirements were never met by any of the respondents. This was another reason that the present appeal of the appellant must be allowed (see paras 76–79 & 81).

(9) Whatever modifications the respondents may wish to make could not mean that the requirements or elements of r 49 of the Regulations 1993 could be discarded. These were fundamental requirements that must be obeyed without any modifications that may affect its purpose. In addition, there were conditions in s 45 of the Terengganu Enactment that must be adhered to but again, these conditions were not fulfilled. Further, the third respondent did not show any instrument specifically adopting Regulations 1993. Thus, it was seriously doubtful that the third respondent could use and adopt Regulations 1993. Consequently, the third respondent had acted without authority in terminating the appellant's service based on public interest (see paras 83–84 & 87).

(10) There was no delay as the application was filed on 11 November 2019, while the date of decision of the appeal by the appellant to the second respondent was on 19 August 2019. This was clearly within three months from the date of the decision of the second respondent. Further, when the hearing for the leave application for judicial review was heard on 9 January 2020, there was no objection from the Attorney-General's Chambers regarding delay. In addition, the notice of cross-appeal clearly stated that the respondents requested that the decision of the HCJ be maintained. In view of this, they must have taken the position that the learned HCJ had given the correct decision and was not in error. This must also include the HCJ's decision that there was no delay by the appellant or the very least, even if there was delay, the same had not prejudiced the respondents. The respondents should not be allowed to

approbate and reprobate. On one hand challenging the decision of the HCJ and on the other, requesting that same decision be upheld (see paras 90–91 & 94).

[Bahasa Malaysia summary

Perayu adalah pembantu tadbir yang berkhidmat di Majlis Agama Islam dan Adat Melayu Terengganu ('responden ketiga'). Dia menghadiri taklimat persiapan persaraan yang mana dia telah menjalani ujian air kencing bersama-sama dengan tetamu lain yang dikendalikan oleh Agensi Anti Dadah Kebangsaan. Ujian air kencingnya disahkan positif dadah jenis methamphetamine tetapi dia tidak pernah didakwa di mahkamah atas dakwaan menggunakan dadah tersebut. Walaupun begitu, responden ketiga mengeluarkan surat tunjuk sebab kepadanya mengikut peraturan 7 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan 1993') dengan tujuan untuk memecatnya daripada perkhidmatan tetapi kemudiannya, dia sebaliknya diberhentikan kerja berdasarkan kepentingan awam. Atas rayuan kepada Lembaga Rayuan Tatatertib ('responden kedua'), keputusan responden ketiga dalam menamatkan perayu berdasarkan kepentingan awam dikekalkan melalui surat yang ditandatangani oleh ketua pegawai eksekutif responden ketiga ('responden pertama'). Perayu kemudiannya mencabar pemberhentiannya melalui permohonan semakan kehakiman menurut A 53 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'), tetapi permohonan tersebut ditolak oleh hakim Mahkamah Tinggi yang bijaksana ('HMT'), justeru, rayuan semasa. Perayu berhujah bahawa: (a) tiada perakuan oleh pegawai perubatan kerajaan bahawa dia menggunakan atau mengambil dadah berbahaya seperti yang dikehendaki oleh peraturan 7(1) dan/atau (2) Peraturan 1993; (b) terdapat ketidakpatuhan prosedur oleh responden ketiga kerana gagal menjalankan prosiding tatatertib mengikut undang-undang bertulis yang berkaitan; dan (c) rayuan tersebut diputuskan oleh responden ketiga apabila ia sepatutnya ditentukan oleh Lembaga Rayuan Tatatertib (responden kedua), oleh itu, ini adalah ketidakwajaran prosedur, menyalahi undang-undang, kepenyalahan undang-undang dan melebihi bidang kuasa. Sebaliknya, responden ketiga berhujah bahawa mereka berada dalam kedudukan untuk bertindak secara fleksibel menurut s 45 Enakmen Pentadbiran Hal Ehwal Agama Islam (Terengganu) 2001 ('Enakmen Terengganu') di mana mereka boleh menerima pakai dan menggunakan Peraturan 1993 dengan pengubahsuaian. Responden-responden telah memfailkan rayuan balas atas alasan bahawa semakan kehakiman tidak sepatutnya dibenarkan oleh HMT kerana perayu lewat dalam permohonannya untuk semakan kehakiman yang mana ini bertentangan dengan A 53 k 3(6) KKM 2012, yang menghendaki permohonan dibuat dalam tempoh tiga bulan dari keputusan yang dipertikaikan.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan HMT dengan kos diberikan kepada perayu:

(1) Memandangkan responden ketiga sendiri merujuk kepada Peraturan 1993 dalam surat tunjuk sebab untuk memulakan tindakan tatatertib, maka responden ketiga harus memenuhi keperluan perundangan subsidiari tersebut. Keperluan peraturan 7(2) Peraturan 1993 ialah mesti ada perakuan dalam bentuk yang ditetapkan oleh pegawai perubatan Kerajaan tentang penggunaan dan pengambilan dadah oleh perayu tetapi dalam kes ini, tiada perakuan sedemikian. Perakuan tersebut merupakan prasyarat sebelum responden ketiga boleh memulakan tindakan tatatertib. Tanpa perakuan tersebut, responden ketiga tidak boleh pun memulakan tindakan tatatertib berdasarkan peraturan 7(2) Peraturan 1993, apatah lagi untuk menamatkan perkhidmatan perayu berdasarkan peraturan 7(3) Peraturan 1993. Atas sebab yang sama, keputusan untuk mengekalkan penamatan perkhidmatan perayu selepas rayuannya tidak boleh dipertahankan (lihat perenggan 39–40 & 42).

(2) Mahkamah tidak bersetuju dengan hujah responden-responden bahawa mereka boleh menggunakan laporan ahli kimia untuk memperakui bahawa perayu menggunakan dadah tersebut kerana ahli kimia ditakrifkan sebagai 'pegawai perubatan' menurut Akta Dadah Berbahaya 1952 ('ADB'). Seorang ahli kimia tidak boleh dianggap sebagai pegawai perubatan kerajaan menurut peraturan 7(3) Peraturan 1993. Perayu juga tidak didakwa di mahkamah menurut mana-mana peruntukan ADB. Oleh itu, status atau kedudukan ahli kimia dalam ADB tidak ada kaitan dengan penamatan perkhidmatan perayu berdasarkan kepentingan awam (lihat perenggan 46).

(3) Ketidakpatuhan prosedur di bawah peraturan 7 Peraturan 1993 adalah kepenyalahan undang-undang dan ketidakwajaran prosedur. Oleh kerana responden ketiga tidak mematuhi prosedur yang diperlukan dalam tindakan dan langkah yang telah diambil terhadap perayu, mahkamah mendapati bahawa campur tangan rayuan adalah wajar untuk membetulkan kesalahan yang telah dilakukan terhadap perayu (lihat perenggan 47 & 50).

(4) Responden ketiga tidak boleh dibenarkan menukar kedudukannya dengan sewenang-wenangnya sehingga memudaratkan perayu. Ini kerana, dengan mengeluarkan surat tunjuk sebab bagi tujuan untuk mengambil tindakan tatatertib mengikut peraturan 7 Peraturan 1993, responden ketiga telah memberikan jangkaan yang sah kepada perayu bahawa ia adalah dengan tujuan untuk memecatnya daripada perkhidmatan dan bukannya menamatkan perkhidmatannya berdasarkan kepentingan awam. Konsep jangkaan yang sah terpakai dalam semakan kehakiman. Kegagalan HMT dalam mengambil kira perubahan kedudukan oleh responden ketiga yang melanggar jangkaan sah perayu adalah tidak wajar dan memudaratkan (lihat perenggan 53–55 & 59).

(5) Dengan pemberian surat tunjuk sebab oleh responden ketiga, terdapat prosedur yang perlu dipatuhi menurut Bahagian V Peraturan 1993 iaitu peraturan 37 Peraturan 1993 dalam mengambil tindakan tatatertib. Tidak dipertikaikan bahawa prosedur ini tidak diikuti oleh responden ketiga apabila ia secara tidak wajar meninggalkan niatnya untuk memecat perayu daripada perkhidmatannya dan sebaliknya mengambil jalan mudah dengan menamatkan perkhidmatan perayu berdasarkan kepentingan awam. Ini adalah satu lagi contoh ketidakwajaran prosedur, oleh itu, rayuan perayu juga harus dibenarkan berdasarkan alasan ini (lihat perenggan 60–63).

(6) Mahkamah berpendapat bahawa peraturan 49(5) Peraturan-Peraturan 1993 bukanlah autoriti untuk menyatakan bahawa hak pendengaran mesti dinafikan. Ini kerana peruntukan tersebut hanya menyatakan hak tersebut tidak perlu diberikan. Ia tidak secara mutlak menunjukkan dalam apa-apa cara bahawa hak tidak boleh diberikan dalam semua keadaan. Ia membayangkan keadaan bahawa masih terdapat kes yang layak di mana pegawai yang terjejas oleh keputusan tersebut tidak sepatutnya dilucutkan hak untuk didengar. Terutamanya dalam rayuan semasa di mana perayu tidak pernah didakwa di mahkamah dan didapati bersalah atas dakwaan menggunakan dadah (lihat perenggan 65–66).

(7) Bagi membolehkan responden bergantung kepada peraturan 49 Peraturan 1993, terdapat beberapa syarat yang perlu dipenuhi. Subperaturan (1) menunjukkan bahawa Kerajaanlah yang berhak untuk menamatkan perkhidmatan pegawai demi kepentingan awam. Kerajaan dalam hal ini tidak boleh diterjemahkan kepada mana-mana responden di sini. Kerajaan di sini bermaksud Kerajaan Malaysia atau Kerajaan Terengganu. Bagi membolehkan pegawai tersebut ditamatkan perkhidmatannya, perlu ada alasan yang mencukupi yang hanya boleh ditunjukkan melalui laporan oleh Ketua Jabatan. Tidak dinafikan bahawa responden tidak mempunyai laporan yang bersifat mandatori ini untuk menyokong tindakan menamatkan perkhidmatan perayu demi kepentingan awam. Oleh itu, ini adalah satu lagi contoh ketidakwajaran prosedur yang mewajarkan rayuan dibenarkan oleh mahkamah (lihat perenggan 73–75).

(8) Peraturan 49(2) menyatakan bahawa laporan mestilah terperinci dan bukan laporan ringkas tanpa butiran penting. Andai kata laporan tersebut dibekalkan sekalipun, di bawah subperaturan (3), Kerajaan perlu berpuas hati bahawa, dengan mengambil kira syarat perkhidmatan, kepentingan pegawai tersebut kepada perkhidmatan, kerja dan kelakuan pegawai tersebut dan semua keadaan lain kes, adalah wajar untuk menamatkan perkhidmatan perayu demi kepentingan awam. Selanjutnya, di bawah subperaturan (4), terdapat keperluan untuk pihak berkuasa tatatertib mengesyorkan kepada Kerajaan supaya perkhidmatan

pegawai ditamatkan demi kepentingan awam walaupun prosiding tatatertib tidak dijalankan di bawah mana-mana peruntukan peraturan tersebut. Tidak dapat dipertikaikan bahawa tidak ada syor sedemikian yang dibuat oleh mana-mana responden dalam kes ini. Tidak ada pertikaian bahawa semua keperluan ini tidak pernah dipenuhi oleh mana-mana responden. Ini adalah satu lagi sebab rayuan semasa oleh perayu mesti dibenarkan (lihat perenggan 76–79 & 81).

(9) Apa-apa pengubahsuaian yang mungkin ingin dibuat oleh responden-responden tidak bermakna keperluan atau elemen-elemen peraturan 49 Peraturan 1993 boleh diketepikan. Ini adalah keperluan asas yang mesti dipatuhi tanpa apa-apa pengubahsuaian yang boleh menjejaskan tujuannya. Di samping itu, terdapat syarat-syarat dalam s 45 Enakmen Terengganu yang mesti dipatuhi tetapi sekali lagi, syarat-syarat ini tidak dipenuhi. Seterusnya, responden ketiga tidak menunjukkan apa-apa instrumen yang mengguna pakai Peraturan 1993 secara khusus. Oleh itu, adalah amat diragui bahawa responden ketiga boleh menggunakan dan menerima pakai Peraturan 1993. Akibatnya, responden ketiga telah bertindak tanpa kuasa dalam menamatkan perkhidmatan perayu berdasarkan kepentingan awam (lihat perenggan 83–84 & 87).

(10) Tidak terdapat kelewatan kerana permohonan telah difailkan pada 11 November 2019, manakala tarikh keputusan rayuan oleh perayu kepada responden kedua adalah pada 19 Ogos 2019. Ini jelas dalam tempoh tiga bulan dari tarikh keputusan responden kedua. Seterusnya, apabila perbicaraan permohonan kebenaran semakan kehakiman didengar pada 9 Januari 2020, tiada bantahan daripada Jabatan Peguam Negara berhubung kelewatan. Selain itu, notis rayuan balas dengan jelas menyatakan bahawa responden memohon agar keputusan HMT dikekalkan. Berdasarkan ini, mereka mesti telah mengambil pendirian bahawa HMT yang bijaksana telah memberikan keputusan yang betul dan tidak khilaf. Ini juga termasuk keputusan HMT bahawa tidak ada kelewatan oleh perayu atau paling tidak, walaupun terdapat kelewatan, kelewatan tersebut tidak menjejaskan responden. Responden tidak boleh dibenarkan untuk 'approbate' dan 'reprobate'. Di satu pihak mencabar keputusan HMT dan di pihak yang lain, memohon agar keputusan tersebut dikekalkan (lihat perenggan 90–91 & 94).]

Cases referred to

A-G of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, PC (folld)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374, HL (refd)

Dato' Dr Mohamad Rameez bin Yahaya v Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No 1) & Anor [2020] 5 MLJ 681, CA (refd)

Dato' Sri Mohd Najib bin Tun Hj Abdul Razak v Attorney General & Ors [2020] 3 MLJ 114, CA (refd)
Jalaluddin bin Ismail v Ketua Pengarah Perkhidmatan Awam, Malaysia & Anor [2012] 6 MLJ 774; [2012] 9 CLJ 183, CA (refd)
Law Pang Ching & Ors v Tawau Municipal Council [2009] 3 MLJ 452; [2010] 2 CLJ 821, CA (refd)
Lendlease Development Malaysia Sdn Bhd v Ketua Pengarah Kastam & Anor [2022] MLJU 1892, HC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors [2013] 1 AMR 116, CA (refd)
Mohammad Zaidie bin Zawawi lwn Dato' Abdul Razak bin Musa, Pengerusi, Lembaga Pencegahan Jenayah dan lain-lain [2021] 3 MLJ 742, CA (refd)
Othman bin Ali v Telekom Malaysia Bhd [2004] 4 MLJ 18, HC (distd)
Pentadbir Tanah dan Daerah Petaling & Ors v Bandar Utama City Corp Sdn Bhd (previously known as Damansara Jaya Sdn Bhd) & Anor and another appeal [2021] 4 MLJ 689, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)

Legislation referred to

Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 s 45
Dangerous Drugs Act 1952
Federal Constitution art 5(1)
Public Officers (Conduct and Discipline) Regulations 1993 rr 7, 7(1), (2), (3), 37, 37(3), (5), 49, 49(1), (2), (3), (4), (5), Part V
Rules of Court 2012 O 53, O 53 r 3(3), (6)

Appeal from: *Nasruddin bin Mohamad lwn Ketua Pegawai Eksekutif dan lain-lain* [2020] MLJU 1672 (High Court, Kuala Terengganu)

Fozi Addhwa bin Mohamad Fozi (Nordin Kassim & Aziz) for the appellant.
Hazri bin Haris (Zamani Mohammad & Co) for the respondent.

Abu Bakar Jais JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge ('HCJ') who had refused the application for judicial review pursuant to O 53

A of the Rules of Court 2012 ('the ROC') filed by the appellant.

[2] Our decision on this appeal is made largely because of the change in the position taken by the respondents, especially the third respondent with regard to the action they had taken against the appellant. The elaboration on our reasons for this appeal ensues.

B

BACKGROUND FACTS

C **[3]** The appellant was an administrative assistant (clerical/operational), Grade N19 in the third respondent, Majlis Agama Islam dan Adat Melayu Terengganu. He attended a briefing regarding preparation for retirement pursuant to a letter from the third respondent. In the briefing, he was subjected to a urine test together with other attendees by Agensi Anti Dadah Kebangsaan ('AADK'). His urine test was confirmed positive for the drug, methamphetamine. He was never prosecuted in court for the alleged use of this drug. Despite that, the third respondent issued a show-cause letter to him with a view of dismissing him from service. Subsequently, action was indeed taken and his service was instead terminated based on public interest.

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[4] The appellant appealed against the decision to terminate his service based on public interest. The third respondent referred the appeal to the Disciplinary Appeal Board, the second respondent. However, the decision to terminate his service based on public interest was maintained through a letter signed by the first respondent, Ketua Pegawai Eksekutif Majlis Agama Islam dan Adat Melayu Terengganu. The appellant then challenged his dismissal in the High Court ('HC') by way of judicial review.

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AT THE HC

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[5] The learned HCJ decided that pursuant to s 45 of the Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 ('Terengganu Enactment') the third respondent has the discretion to vary accordingly the rules, policies, circulars and directions issued by the Federal Government and/or State Government as long as it is not in conflict which each other.

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[6] As the third respondent had adopted the Public Officers (Conduct and Discipline) Regulations 1993 ('Regulations 1993') in taking disciplinary action, the High Court should give emphasis to rr 7(3) and 49 of the Regulations 1993 regarding termination of service in public interest.

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[7] The third respondent has absolute right either to dismiss the appellant from service or to terminate the service of the same based on public interest.

[8] Although the third respondent informed the appellant that disciplinary action was taken with the view of dismissing the latter, the former could use its discretion instead to terminate the service of the appellant based on public interest after considering the appellant's reply to show cause or representation dated 5 March 2018 and another appellant's letter dated 13 March 2018. The learned HCJ also found that the third respondent had again used its discretion when it received the appellant's appeal letter dated 4 November 2018 and it forwarded that letter to the second respondent for its consideration.

[9] The third respondent acted correctly and not against the law when it decided to terminate the appellant's service based on public interest after considering the appellant's appeal.

[10] The third respondent can act based on that discretion as the appellant had been entrusted to manage tithe and public pawn and terminating his service in public interest is appropriate and reasonable as the appellant's urine test had been confirmed positive.

[11] The learned HCJ found that the appellant's special right was not prejudiced as though his service had been terminated, he is still entitled to his pension. He is fortunate to have his service terminated in view of public interest instead of being outrightly dismissed.

SUMMARY OF THE APPELLANT'S SUBMISSION

[12] When the decision to terminate his service based on public interest was made and when his appeal was rejected, there was no certification by a Government medical officer that he was using or consuming a dangerous drug as required by r 7(1) and/or (2) of the Regulations 1993.

[13] Only after these two events did the third respondent write to AADK requesting for certification from a medical officer. The certification was later given upon this request.

[14] The certification should not be accepted at that late stage, as it is a prerequisite before the termination. Therefore, the termination is unlawful and invalid. The High Court erred in not considering at all this issue in dismissing the application for judicial review.

[15] Certiorari should be granted to quash the decision to terminate his service by the third respondent signed by the first respondent. Declaration to the same effect should also be allowed by the High Court.

A **[16]** There is procedural impropriety in the decision by the third respondent to terminate the appellant's service based on public interest.

[17] There is material difference between the charge against the appellant and the letter informing him of the decision to terminate his service. The
B charge referred to taking disciplinary action with a view for dismissal from service. While the decision was made that the appellant's service be terminated based on public interest. Dismissal from service and termination of his service based on public interest are two different actions with different consequences. The High Court erred in failing to appreciate, consider and determine that
C action to terminate the service of the appellant in public interest is inconsistent with the charge, which is with a view for dismissal from service simpliciter.

[18] There is a need for a disciplinary proceeding against the appellant pursuant to the relevant written law but this was not done by the third
D respondent. Thus, there is procedural non-compliance against the appellant.

[19] In any event, the decision to terminate the appellant's service should have been done by the Disciplinary Committee of the third respondent and not the third respondent itself. The letter informing about the termination was
E signed by the third respondent's Chief Executive Officer and not by the Chairman of the Disciplinary Committee of the third respondent. In fact, the action taken against the appellant never went through this committee.

F **[20]** There was excess of jurisdiction as the third respondent has no jurisdiction to terminate the service of the appellant. The decision to terminate is therefore wrong in law.

[21] The appeal was decided by the third respondent when it was supposed
G to be determined by Disciplinary Appeals Board of the third respondent. This is procedural impropriety, unlawful, an illegality and an excess of jurisdiction.

[22] The appellant was never given the reasons to terminate his service nor to reject his appeal. It is a fundamental legal principle that reasons must be given
H but this was not provided for the appellant.

[23] The appellant should be reinstated to his position with all pay, emolument and benefit due to him. General, aggravated, and exemplary damages together with costs should also be granted to the appellant.

I

SUMMARY OF THE RESPONDENTS' SUBMISSION

[24] The relevant written law allows the third respondent to adopt and vary the regulations, policies, circulars, and directions or instructions made and

issued by the Federal or State Government. Thus, the action to terminate the service of the appellant can be made in view of this right granted to the third respondent.

[25] The learned HCJ did not find that the third respondent had varied the Regulations 1993 in this case. Hence, this ground is a non-issue that justifies the present appeal to be dismissed.

[26] The decision to terminate the appellant's service was indeed made by the third respondent and this is not disputed. Rule 49 of the Regulations 1993 provides that the 'Government' has the right to terminate the service based on public interest. The third respondent is similar to a 'Government' as it has adopted Regulations 1993. Therefore, it could terminate the appellant's service based on public interest.

[27] Contrary to the contention of the appellant, r 49 of the Regulations 1993 does not say that the Disciplinary Committee and/or the Disciplinary Appeals Board has the right to terminate the appellant's service in the public interest.

[28] Disciplinary procedure under Part V of the Regulations 1993 will only be applicable to the third respondent if the same decides to take disciplinary action against the appellant pursuant to r 7(2) of the Regulations 1993. However, in this case, the third respondent decided not to take disciplinary action but to terminate the service of the appellant.

[29] Under r 49(5) of the Regulations 1993, terminating the appellant's service based on public interest is not similar to dismissing the appellant from service after disciplinary action.

[30] Pursuant to the same r 49(5) of the Regulations 1993, there is no right of hearing for termination of service on public interest.

[31] Based on the reply by the appellant to the show cause letter, the third respondent decided not to take disciplinary action pursuant to r 7(2) of the Regulations 1993 but adopted r 7(3) of the Regulations 1993 to terminate the appellant's service. Thus, the third respondent's move initially in issuing the show cause pursuant to r 7(2) of the Regulations 1993 and then terminating the appellant's service pursuant to r 7(3) of the Regulations 1993 is consistent with r 49 of the Regulations 1993 on terminating the service on public interest as the same prevails over and supersedes other provisions of Regulations 1993.

[32] There are no provisions in the Terengganu Enactment or Regulations 1993 requiring the third respondent to provide reasons for decision to terminate the appellant's service based on public interest pursuant to r 49 of the Regulations 1993.

[33] When the third respondent decided to terminate the appellant's service in public interest pursuant to r 7(3) of the Regulations 1993, all requirements pursuant to r 7(2) of the Regulations 1993 are not applicable.

[34] The report by the chemist to certify that the appellant was using the drug methamphetamine was sufficient as the chemist is defined as a 'medical officer' in the Dangerous Drugs Act 1952. As the term 'medical officer' is not defined in Regulations 1993, the definition of the same in Dangerous Drugs Act 1952 could be used where even a chemist as a science officer is considered a medical officer.

[35] The third respondent was justified to terminate the appellant's service based on public interest because of the use of the drug methamphetamine. Hence the judicial review against this decision was correctly dismissed by the HC.

[36] For the cross-appeal by the respondents it is contended there is a delay by the appellant in applying for judicial review.

OUR DECISION

[37] There is no dispute that the third respondent first initiated the disciplinary action against the appellant because of the traces of drug, methamphetamine found after his urine test. As a consequence, by a letter dated 15 February 2018, the third respondent issued to the appellant the show cause letter pursuant to r 7 of the Regulations 1993. This provision states as follows:

> (1) An officer shall not use or consume any dangerous drug, except as may be prescribed for his use or consumption for medicinal purposes by a medical practitioner who is registered under the Medical Act 1971, or abuse or be dependent on any dangerous drug.
>
> (2) *If a Government Medical Officer certifies in the form as prescribed in the Schedule that an officer is using or consuming*, other than for medicinal purposes, a dangerous drug or is abusing or dependent on a dangerous drug, that officer shall be liable to disciplinary action with a view to dismissal.
>
> (3) *Notwithstanding sub-regulation (2), the service of an officer whom a Government Medical Officer has certified to be using or consuming, other than*

for medicinal purposes, a dangerous drug or abusing or dependent on a dangerous drug may be terminated in the public interest under regulation 49 if the officer has attained the optional retirement age specified by the Government at that time.

(4) For the purpose of this regulation, 'dangerous drug' means any drug or substance listed in the First Schedule to the Dangerous Drugs Act 1952. (Emphasis added.)

[38] In the said letter, the third respondent requested the appellant for explanation within 21 days of the date of the letter, as to why disciplinary action could not be taken against him.

[39] Since the third respondent itself referred to the above written law in that letter to initiate the disciplinary action, there can be no doubt that the third respondent should satisfy the requirements of that subsidiary legislation. As seen, the requirement of r 7(2) of the Regulations 1993 is that there must be a certification in a prescribed form by a medical Government officer as to the use and consumption of the drug, in this case, by the appellant. In this regard, there is no dispute there was no such medical certification not only when this letter was issued but also when the appellant's service was eventually terminated in public interest. We consider this unfair to the appellant and therefore should not be an acceptable act by the third respondent. It is also undeniable that the appellant was never charged in court in respect of this alleged use and consumption of the drug.

[40] It should be obvious that the need for such certification, no less in the prescribed form by a Government medical officer, is to ensure that there is sufficient evidence to start the disciplinary action against the appellant premised on the alleged use and consumption of the drug. That certification from a Government medical officer acts as a safeguard to anyone including the appellant from arbitrary and possible unjustified action by the employer, in this case, the third respondent. That certification is a prerequisite before the third respondent could initiate the disciplinary action. Without the same, the third respondent could not even begin a disciplinary action based on that provision as stipulated in r 7(2) of the Regulations 1993. What more to terminate the appellant's service based on the same provision as specifically spelt out in r 7(3) of the Regulations 1993 shown above.

[41] The next significant action by the third respondent after the appellant replied to the above letter is to issue another letter dated 1 October 2018. In this letter, the third respondent informed the appellant that his service is terminated. As a consequence, the appellant appealed against this decision to terminate by his letter dated 4 November 2018. The third respondent

A subsequently on 19 August 2019 informed him that his appeal is rejected and the decision to terminate his service is upheld.

B **[42]** As explained earlier, this decision to maintain the termination of the appellant's service after his appeal cannot with respect stand. Again, this is because that decision is not supported by a certification of a Government medical officer as required by r 7(3) of the Regulations 1993 shown above.

C **[43]** Ironically, even the third respondent itself understood, appreciated and realised the need for such certification because only on 8 September 2019 did it send a letter to AADK requesting for such certification. This is well over one year and six months after the first letter dated 15 February 2018 was sent by the third respondent to the appellant to start the disciplinary action against the latter. This is also almost a year since the third respondent issued a letter dated 1 October 2018 informing the appellant that his service is terminated. This is also almost a year after the appellant appealed against this decision to terminate his service by his letter dated 4 November 2018. Finally, this is roughly three weeks after the third respondent informed the appellant on 19 August 2019 that his appeal is rejected and that the decision to terminate his service is upheld. Only on 11 September 2019, well after the decision to terminate the appellant's service and the rejection of his appeal, did AADK provide the third respondent the certification it needed.

F **[44]** It is quite obvious that based on the dates shown, the third respondent's appreciation and realisation of the need for the certification of a Government medical officer is unfortunately too late. It would not have requested for such certification from AADK had it honestly believed it is unnecessary, irrelevant and not mandatory.

G **[45]** Further, only on the stated date 8 September 2019 when the third respondent requested the certification from AADK, the full requirements of r 7 of the Regulations 1993 as narrated earlier, must have dawned on them. The third respondent only then realised their various actions of initiating the disciplinary action, deciding to terminate the appellant's service, informing the H appellant that his appeal is rejected and upholding the termination must all be first predicated by the certification from the Government medical officer as required by that subsidiary legislation. The third respondent obviously then could not turn back to undo the actions it had taken and unwittingly found itself in that embarrassing position.

I **[46]** In the same breath, it is no comfort for the third respondent to argue that it can instead use a chemist report to certify that the appellant was using the drug methamphetamine as the chemist is defined as a 'medical officer' pursuant to the Dangerous Drugs Act 1952 ('the DDA'). This with respect,

sounds a little desperate from the third respondent as what should be looked at is r 7(3) of the Regulations 1993 shown above and not the DDA. This also sounds desperate because if the chemist report could be used, the third respondent would not have requested AADK only on 8 September 2019 for a certification from a Government medical officer as required by r 7(3) of the Regulations 1993. Further, a chemist cannot be considered as a Government medical officer pursuant to r 7(3) of the Regulations 1993. The appellant also was not prosecuted in court pursuant to any provisions of the DDA. Thus, the status or position of the chemist in the DDA is of no relevance to the termination of the appellant's service based on public interest.

[47] The non-compliance with regards to procedure as laid down in r 7 of the Regulations 1993 is both an illegality and procedural impropriety, the two components for judicial review besides irrationality and proportionality (please see the judgment of Tengku Maimun Tuan Mat Chief Justice in the Federal Court case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750).

[48] It is illegal as the third respondent's action and decision were not supported by the certification from a Government medical officer as required by the written law. It is also illegal as the third respondent did not fully appreciate r 7 of the Regulations 1993, the law it had used to initiate against the appellant. In this respect, reference is made to what was stated by Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374:

> *By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it.* Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. (Emphasis added.)

[49] It is also a procedural impropriety as in this case, all the actions of the third respondent as narrated, must begin with such certification. As explained, that certification is absent at all material times. In this respect, again, Lord Diplock in the above case said:

> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. *This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.* (Emphasis added.)

[50] As the third respondent did not adhere to the procedure required in the actions and steps it had taken against the appellant, we consider that we must at the appellate stage intervene to correct the wrong that had been done to the latter. A decision in point on this matter is the Court of Appeal case of *Dato' Dr Mohamad Rameez bin Yahaya v Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No 1) & Anor* [2020] 5 MLJ 681 where our learned sister Badariah Sahamid JCA said:

> [48] *For all the reasons stated above, we are of the considered view that there are serious procedural improprieties in the decision-making process of the first and second respondents that warrant appellate intervention.*
>
> ...
>
> [50] *We would like to emphasise here that in exercising public functions against the individual, public bodies have a duty to act fairly in substance as well as procedure and courts have to be vigilant to ensure that might does not become right.* More than 40 years ago, the late Raja Azlan Shah CJ (Malaya) (as HRH then was) had made the following observations in the celebrated case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, which observations still ring true today. His Lordship stated:
>
> > Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint, where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression.
> >
> > In these days when Government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen, so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place (per Danckwerts LJ in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434 at p 443). (Emphasis added.)

[51] Another material point to note is that when the third respondent first initiated the disciplinary action by issuing the letter dated 15 February 2018, it clearly stated that the same was with a view to possibly dismissing him from service and not to terminate his service based on public interest. However, subsequently, the third respondent issued a letter dated 1 October 2018 informing the appellant that his service is terminated based on public interest. In that letter dated 15 February 2018 the disciplinary action contemplated was pursuant to r 7 of the Regulations 1993 that stipulates disciplinary action can be taken with the view for dismissal from service.

[52] Why was there a change in course by the third respondent? It would not be too remote to suggest the third respondent had no choice but to change its position, through no fault of the appellant. This is because it had realised quite late in the day that it had failed to comply with the condition that a certification in a prescribed form by a medical Government officer must be obtained before the disciplinary action pursuant to r 7 of the Regulations 1993 is taken. Realising the quagmire, the third respondent was forced to think of alternative actions. It then thought the best alternative was to terminate the appellant's service based on public interest without fully appreciating the pitfalls of that action as will be shown in this judgment.

[53] As a start, should the third respondent be allowed to change its position arbitrarily at the expense of the appellant? We do not think so. This is because by issuing the letter dated 15 February 2018 towards taking disciplinary action pursuant to r 7 of the Regulations 1993, the third respondent had provided the appellant with legitimate expectation that it was with a view of dismissing him from service and not terminating his service based on public interest.

[54] This change in position by the third respondent, infringing on the appellant's legitimate expectation with respect was not addressed by the learned HCJ in his grounds of judgment or anywhere in the notes of evidence. We consider this inappropriate and fatal as there is a legitimate expectation by the appellant that his service would not be terminated on the basis of public interest. The third respondent may rightly change its position only if there is no legitimate expectation on the appellant that the initial action of dismissing him from service was to be taken and not terminating his service based on public interest.

[55] In this respect, it is well-entrenched that the concept of legitimate expectation applies in judicial review. We had researched for the latest cases on this point and found the recent case of *Lendlease Development Malaysia Sdn Bhd v Ketua Pengarah Kastam & Anor* [2022] MLJU 1892 where Ahmad Kamal Md Shahid J aptly quoted high authorities on the applicability of this principle as follows:

> [45] It is trite law that a decision by a public authority may be quashed on the ground that it is in violation of a *legitimate expectation* (see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529).
>
> [46] Such doctrine is also applicable in tax cases, as demonstrated by the Indian Supreme Court in *MRF Ltd, Kottayam v Assistance Commissioner (Assessment) Sales Tax & Ors* (2006) 8 SCC 702, where it was held that:
>
> > *The doctrine of legitimate expectation has an important place in the developing law of judicial review*. It is, however, not necessary to explore the doctrine in this case,

A

> it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. (Emphasis added.)

B

[56] That decision of the Federal Court in *Majlis Perbandaran Pulau Pinang* quoted by the High Court above, reiterates the application of legitimate expectation for judicial review, first by approving a text as follows:

> de Smith says (at para 13–035):
>
> Now that legitimate expectation has been accepted in law as an interest worthy of protection, its existence becomes a relevant consideration which must be taken into consideration in the exercise of a discretion. It is placed on the scale and must be properly weighed.

C

[57] It then went on to say:

D

> In *Breen v Amalgamated Engineering Union & Ors* [1971] 2 QB 175 at p 191 Lord Denning observed that where a person has some right or interest, or legitimate expectation of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him accordingly, as the case may demand.

E

(See also a host of other cases on the relevance of legitimate expectation for judicial review including, Court of Appeal case of *Pentadbir Tanah dan Daerah Petaling & Ors v Bandar Utama City Corp Sdn Bhd (previously known as Damansara Jaya Sdn Bhd) & Anor and another appeal* [2021] 4 MLJ 689, Court of Appeal case of *Law Pang Ching & Ors v Tawau Municipal Council* [2009] 3 MLJ 452; [2010] 2 CLJ 821 and another Court of Appeal case of *Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors* [2013] 1 AMR 116.)

F

G

[58] However, what is the scope of legitimate expectation? How wide is the applicability of this principle? In this regard, the Privy Council in the case of *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 throws some light on this and explains as follows:

H

> The narrower proposition for which the applicant contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has 'a legitimate expectation' of being accorded such a hearing. The phrase 'legitimate expectation' in this context originated in the judgment of Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, at p 170. It is many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, at p 404, Barwick CJ construed the word 'legitimate' in that phrase as expressing the concept of 'entitlement or recognition by law'. So understood, the expression (as Barwick CJ rightly observed) 'adds little, if anything, to the concept of a right'. With great respect to Barwick CJ, their Lordships consider that the word 'legitimate' in that expression falls to be read as meaning 'reasonable.'

I

Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see Reg v Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 QB 864. *So it was held in Reg v Board of Visitors of Hull Prison, Ex parte St Germain (No 2)* [1979] 1 WLR p 1041 *that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.* (Emphasis added.)

[59] There can be no doubt, guided by the above case, the appellant's legitimate expectation in our present appeal that his service would not be terminated based on public interest is only reasonable. This is because the initial conduct and action of the third respondent was to start the disciplinary action with a view to dismiss the appellant from service but not to terminate his service based on public interest.

[60] Moving on to a different point, with the issuance of that letter dated 15 February 2018 by the third respondent, towards taking disciplinary action pursuant to r 7 of the Regulations 1993, there are procedures that must be followed pursuant to Part V of the Regulations 1993 in taking disciplinary action. In this regard r 37 under Part V of the Regulations 1993 stipulates as follows:

Procedure in disciplinary cases with a view to dismissal or reduction in rank

(1) If it is determined under subregulation 35(2) that the disciplinary offence complained of against an officer is of a nature that warrants a punishment of dismissal or reduction in rank, the Chairman of the appropriate Disciplinary Authority to which the case is referred shall consider all the available information.

(2) If it appears to the Chairman of the appropriate Disciplinary Authority that there exists a prima facie case against the officer, the Chairman of the appropriate Disciplinary Authority shall:

(a) direct that a charge containing the facts of the disciplinary offence alleged to have been committed by the officer and the grounds on which it is proposed to dismiss the officer or reduce his rank be sent to the officer; and

(b) require the officer to make, within a period of twenty-one days from the date he is informed by notice in accordance with regulation 52 of the charge, a written representation containing the grounds upon which he relies to exculpate himself.

(3) *If, after considering the representation made pursuant to sub-regulation (1), the appropriate Disciplinary Authority is of the opinion that the disciplinary offence committed by the officer does not warrant a punishment of dismissal or reduction in rank, the appropriate Disciplinary Authority may impose upon*

the officer any of the lesser punishments specified in regulation 38 as it deems appropriate.

(4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer makes such a representation but the representation does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) *If the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may establish an Investigation Committee for the purpose of obtaining such further clarification*.

[61] As seen that provision above, must be followed for the disciplinary action intended to dismiss the appellant from service. It is not to terminate the appellant's service based on public interest.

[62] There are procedures to be followed, for instance as highlighted above of sub-regs (3) and (5). There is no dispute these were not followed by the third respondent when it unjustifiably abandoned its intention to dismiss the appellant from his service and took the easy way out by terminating the appellant's service based on public interest instead.

[63] Hence, this is another instance of procedural impropriety, a ground for judicial review as explained earlier. As a consequence, the appellant's appeal should also be allowed based on this reason.

[64] In addition, the decision to terminate the appellant's service based on public interest naturally has a far-reaching effect on the appellant or anyone in the same position. By the stroke of the pen, the appellant is effectively rendered helpless and without recourse against the action of the third respondent to terminate his service based on public interest. As a consequence, the appellant is bound to lose his livelihood at least while he is serving the third respondent. In view of the serious repercussions that will ensue by the third respondent's action, it is only fair the same must comply with all procedures laid down before that action can be taken.

[65] Further, it is only just and prudent for the appellant to be given the opportunity not only to be told of the reason and basis to terminate his service on public interest, but also be assured of his right to challenge that reason and basis. Nonetheless, we are fully aware that r 49(5) of the Regulations 1993 stipulates that the right of hearing may not be given when an officer is terminated of his service in public interest. This provision states:

> Notwithstanding anything in these Regulations and any other law to the contrary, in terminating the service of any officer in the public interest under this regulation, such officer may not be given any opportunity of being heard ...

[66] We are of the view that the above provision is no authority to say the right of hearing in this regard must necessarily be denied. This is because the provision only states such right may not be given. It did not categorically indicate in any manner that right must not be accorded in all circumstances. It envisages a situation there could still be deserving cases where the officer affected by that decision should not be deprived of the right of being heard. Especially in this present appeal where the appellant was never charged in court and found guilty on the alleged use of the drug.

[67] In this regard, we are also aware of the Court of Appeal case of *Jalaluddin bin Ismail v Ketua Pengarah Perkhidmatan Awam, Malaysia & Anor* [2012] 6 MLJ 774; [2012] 9 CLJ 183 that decided there is no right of hearing when anyone is terminated of his service pursuant to r 49 of the Regulations 1993. Perhaps the time has come to review this decision based on the reasons we have given earlier. Nonetheless, there is no urgent need to do that at the moment simply because in this present case the reasons we have given earlier and the ensuing reasons narrated would still mean that the third respondent's decision to terminate the appellant's service based on public interest could not possibly stand.

[68] Permitting the third respondent to conveniently used the all-encompassing and wide 'public interest' to condemn the appellant from his livelihood, without strong reasons is of course unjust. It would also tantamount to condoning the possible arbitrary action of the all-too powerful authorities like the third respondent, at the expense of the average Joe, like the appellant in seeking what is often a modest living.

[69] In this regard, it is now well established that the right to livelihood is guaranteed by the highest law in the land. Article 5(1) of the Federal Constitution states:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[70] The word 'life' above has long been construed to include livelihood. In the Court of Appeal case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, two Indian cases were quoted with approval as explaining that life includes livelihood. The case states as follows:

> The first of these is *Olga Tellis v Bombay Municipal Corp* AIR 1986 SC 180 at p 193, where Chandrachud CJ said:

> For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by art 21 (the equivalent of our art 5(1)) is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live and yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.

The second is *Delhi Transport Corp v DTC Mazdoor Congress & Ors* (1991) Supp1 SCC 600 at p 717, Satwant J when delivering the majority judgment of the Supreme Court said:

> The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority.

[71] The third respondent sought to rely on r 7(3) of the Regulations 1993 to justify the action of terminating the appellant's service based on public interest. For the sake of convenience, this provision is narrated again as follows:

> Notwithstanding subregulation (2), the service of an officer whom a Government Medical Officer has certified to be using or consuming, other than for medicinal purposes, a dangerous drug or abusing or dependent on a dangerous drug may be terminated in the public interest under regulation 49 if the officer has attained the optional retirement age specified by the Government at that time.

[72] The third respondent also relied on r 49 of the Regulations 1993 to terminate the appellant's service based on public interest. As it contended it can rely on this provision, it must also be prepared to show evidence it had complied with the requirements of the same. This provision states:

> (1) Notwithstanding any provision in these Regulations, where the Government finds or where representations are made to the Government that it is desirable that the service of an officer be terminated in the public interest, the Government may call for a full report from the Head of Department in which the officer is or has been serving.

(2) The report referred to in subregulation (1) shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department.

(3) If, after considering the report received under subregulation (1), the Government is satisfied that, having regard to the conditions of the service, the usefulness of the officer to the service, the work and conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate the service of the officer with effect from such date as the Government shall specify.

(4) It shall be lawful for the appropriate Disciplinary Authority to recommend to the Government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings have not been carried out under any of the provisions of these Regulations; and the Government may so terminate the service of such officer.

(5) Notwithstanding anything in these Regulations and any other law to the contrary , in terminating the service of any officer in the public interest under this regulation, such officer may not be given any opportunity of being heard and an officer whose service has been terminated in the public interest under this regulation shall not for the purpose of Article 135(2) of the Federal Constitution, be regarded as having been dismissed, regardless of whether such termination of the service of the officer involved an element of punishment or was in connection with conduct in relation to his office which the Government regards as unsatisfactory or blameworthy.

[73] In order for the third respondent to rely on this provision, as seen there are several conditions that must be fulfilled. First, sub-reg (1) of the Regulations 1993 above indicates it is the Government that has a right to terminate the service of an officer in the public interest. The Government in this regard could not mean any of the respondents here, including the third respondent who issued the letter to terminate the appellant's service. In fact, at para 12 of the written submission of the respondents, the same admitted they are not the Government. The Government here means the Malaysian Government or Terengganu Government. This proposition is reinforced also by sub-reg (1) which states that the Government may call for a full report from the Head of Department in which the officer is or has been serving. It should be obvious this report must be mandatorily provided to the Government for the simple reason the same cannot terminate an officer's service at its whim and fancy. In order for the officer to be terminated of his service, it goes without saying there must be sufficient reasons. That sufficient reasons can only be shown by way of the report by the Head of Department. The Government on its own is not in the position to simply terminate an officer's service without that report.

[74] Another material point to note is that though the word used in sub-regulation (1) is 'may' with regard to the requirement of this report, it should not be discretionary or directory. Instead it must be mandatory because as clear as daylight, the Government per se cannot on its own simply terminate an officer's service based purely on public interest without basis. That basis is supposed to be provided by that report by the Head of Department, who knows much more in respect of the service and position of an officer. This is why that report is mandatory and not discretionary. After all, in the Court of Appeal case of *Mohammad Zaidie bin Zawawi lwn Dato' Abdul Razak bin Musa, Pengerusi, Lembaga Pencegahan Jenayah dan lain-lain* [2021] 3 MLJ 742 it is said:

> The principle of law in relation to the interpretation of the word 'may' by the legislator was clear. It connoted an obligation or an option. Naturally the use of the word 'may' did not mean mandatory but rather to provide an option. *However, there were instances when the word 'may' be interpreted as mandatory.* (Emphasis added.)

[75] There is also no dispute that the respondents do not have this report to support the action of terminating the appellant's service in public interest. Therefore, this is another instance of procedural impropriety, justifying the appeal to be allowed by this court.

[76] To add to the woes of the respondents, the report must be elaborate and not a simple report devoid of essential particulars. This requirement is stipulated in sub-reg (2) of r 49 of the Regulations 1993 above. As seen, the report shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department.

[77] In addition, even if the report is supplied (which is not), the Government will have to be satisfied that, having regard to the conditions of the service, the usefulness of the officer to the service, the work and conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate the service of the officer with effect from such date as the Government shall specify. This is a requirement as seen in sub-reg (3) of r 49 of the Regulations 1993 above.

[78] Further, there is a need for the Disciplinary Authority to recommend to the Government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings have not been carried out under any of the provisions of the regulations; and the Government may so terminate the service of such officer. This is provided by sub-reg (4) of r 49 of the Regulations 1993 of the Regulations 1993 as seen above. There is no dispute there is no such recommendation made by any of the respondents in the present case.

[79] Thus, all these exacting requirements imposed on the respondents must be fulfilled in order to terminate the service of the appellant in the public interest. This ought to be so as terminating an officer's service in the public interest is such a drastic action that should only be resorted to with cogent reasons and preferably only as a last resort.

[80] Further, even if it is true there is no right of hearing for an officer when his service is terminated in the public interest, as contended by the respondents, all the above requirements must still be fulfilled because these fundamental requirements are prerequisites before such termination. All these requirements do not hinge on the issue of whether a right of hearing should be given or otherwise.

[81] There is no dispute all these requirements were never met by any of the respondents, including the third respondent. This is another reason that the present appeal of the appellant must be allowed.

[82] On a different but significant note, the third respondent argued that they are in a position to act in a flexible manner because of what is provided by s 45 of the Terengganu Enactment. This provision states as follows:

> *In making any regulations under this part, the Majlis may, with the approval of the Duli Yang Maha Mulia Sultan*, adopt with such modifications as it deems fit any regulations, policies, circulars and directives enacted or issued by the Federal Government or State Government. (Emphasis added.)

[83] Based on the above provision, the third respondent contended they could adopt and use Regulations 1993 with modifications. This is to justify the action in terminating the appellant's service in the public interest. Without Regulations 1993, the third respondent could not do so. However, whatever modifications they may wish to make could not mean that the requirements or elements of r 49 of the Regulations 1993 as explained earlier could be discarded. As shown, the requirements are prerequisites before an officer can be terminated of his service based on public service. These are fundamental requirements that must be obeyed without any modifications that may affect its purpose.

[84] More importantly, scrutinising s 45 of the Terengganu Enactment above, there are conditions in that section that must be adhered to. First, there must be an effort to make the regulations. There is no such effort as the respondents did not show evidence for this. Second, only if there is evidence that such effort was indeed made, can the adoption and modifications be accepted. Third, such adoption and modifications must be approved by Duli Yang Maha Mulia Sultan. There is again no evidence to this effect from the respondents. Thus, it is seriously doubtful that the third respondent could use

and adopt Regulations 1993. As a consequence, with respect, the third respondent acted without authority in terminating the appellant's service based on public interest.

[85] To compound the third respondent's mistaken reference to s 45 of the Terengganu Enactment in this case, the learned HCJ in his written grounds, followed erroneously the submission of the third respondent and with respect incorrectly said as follows:

> Berdasarkan kepada permohonan Pemohon dah hujahan pihak-pihak, saya mendapati bahawa Seksyen 45 Enakmen Pentadbiran Hal Ehwal Agama Islam (Terengganu) 2001 memberi MADIM kuasa budibicara untuk membuat apa- apa ubahsuaian yang difikirkan patut kepada mana-mana Peraturan, Dasar, Pekeliling dan Arahan yang dikeluarkan oleh Kerajaan Persekutuan/Kerajaan Negeri selagi ianya tidak bercanggah di antara satu sama lain. *Ini telah disahkan melalui keputusan Mahkamah di dalam Othman bin Ali v Telekom Malaysia Bhd* [2004] 4 MLJ 18 (Emphasis added.).

[86] First, the case of *Othman bin Ali* cited by the learned HCJ above did not even refer to s 45 of the Terengganu Enactment. We studied closely *Othman bin Ali* which is the judgment of Ahmad Maarop J (later PCA) and found there was no reference at all to that statutory provision. Nor was there any reference to any part of the enactment itself. Since there was no such reference, we do not think the learned HCJ was right and in fact was plainly wrong to find that statutory provision empowers the third respondent to use and adopt Regulations 1993 with modifications, premised on the case of *Othman bin Ali*. Reading the whole case of *Othman bin Ali*, it is clear to us that the learned HCJ went into error in believing the respondents that Othman bin Ali is the authority for them to use and adopt Regulations 1993 with modifications, premised on s 45 of the Terengganu Enactment. In fact, *Othman bin Ali* is not at all about a case of the adoption of any written law. Neither is the case about adoption of any policies, circulars and directives as stipulated in s 45 of the Terengganu Enactment.

[87] This brings us again to the Terengganu Enactment itself. As indicated earlier, the third respondent submitted s 45 of the Terengganu Enactment allows for the adoption with such modifications as it deems fit any regulations, policies, circulars and directives enacted or issued by the Federal Government or State Government. However, it is most important to note, there is still no evidence at all of what exactly is the regulations, policies, circulars and directives enacted or issued by the Federal Government or State Government which were adopted by the third respondent. It is only the bare assertion, devoid of merit of the third respondent that there was such adoption and modifications of Regulations 1993. More relevant to the point is that the third respondent did not show any instrument specifically adopting Regulations

1993. There is no proof including documentary proof, even by way of a simple letter to say Regulations 1993 had been adopted all these years by the third respondent. That renders the applicability of Regulations 1993 largely questionable for the third respondent. Thus, the damaging ensuing result for the third respondent is that it cannot terminate the appellant's service based on public interest because it cannot even use and refer to Regulations 1993, in particular r 49 of the Regulations 1993 as it thought it could, as basis and authority for that action.

[88] It is also pertinent to address the contention of the third respondent that the appellant should consider himself fortunate to be terminated of his service based on public service as he would still be paid his pension. This contention is the very least fallacious because it shows that the third respondent is oblivious to the fact that the appellant submitted that action to terminate his service based on public interest is in the first place unjustified at all. The third respondent should realise that what the appellant is contending is that the former is in no position legally and factually to terminate the service of the appellant based on public interest. It is not a question of being able to enjoy the appellant's pension but the fundamental issue that the third respondent acted wrongly in terminating his service based on public interest. In fact, this contention by the third respondent with respect, only confirms its dreadful case because it initially wanted to dismiss the appellant from service based on r 7(2) of Regulations 1993 but then had to change tact in terminating the appellant's service based on public interest purportedly pursuant to r 7(3) read with r 49 of the Regulations 1993.

CROSS-APPEAL

[89] There is a cross-appeal by the respondents on the ground that the judicial review should not have been granted by the HC because the appellant was late in his application for judicial review, in contravention of O 53 r 3(6) of the ROC, which requires the application to be made within three months from the impugned decision. According to the respondents, this is because the application for judicial review was only filed on 11 November 2019, while the appellant was informed on 1 October 2018 that his service has been terminated in public interest.

[90] On this issue, first, we do not think there is any delay as the application was filed on 11 November 2019, while the date of decision of the appeal by the appellant to the second respondent was on 19 August 2019. This is clearly within three months from the date of the decision of the second respondent. In this regard, the third respondent had informed the appellant that his appeal will be forwarded to the second respondent. Thus, the appellant needs to exhaust all his remedies including this appeal to the second respondent before

A the application for judicial review could be filed. As stated, this was filed within the stipulated time after the decision of the appeal by the second respondent. Therefore, with respect to the respondents, we do not agree there was a delay on the part of the appellant in filing the application for judicial review.

B **[91]** Further, when the hearing for the leave application for judicial review was heard on 9 January 2020, there was no objection from the Attorney General's Chambers ('AGC'). Hence the leave was accordingly granted by the HC for the appellant. Had this issue of delay been a serious one that will prejudice the respondents, it is only foreseeable the AGC would have recorded C its strong objection on this delay. Instead the AGC did not raise any objections for the application for leave. It would not be too remote to suggest in view of this circumstance, the AGC was of the opinion the application for judicial review should proceed on its merits at the substantive stage. We too see no prejudice to the respondents as what was relied by the respondents in resisting D the judicial review, as shown, is not the question of delay but their core submission they are at liberty to terminate the appellant's service in public interest.

E **[92]** In this regard, it should also be appreciated there are two stages in the application for judicial review pursuant to O 53 of the ROC. First is the leave stage and second is the substantive stage. It should also be noted, prior to the first stage for leave, the AGC must be notified pursuant to O 53 r 3(3) of the ROC and served with the statement and affidavit supporting that application. F This must be done, irrespective of whether the AGC is directly involved in the case, just like the present case where the AGC appeared only at the leave stage but not the substantive stage. This is because the AGC acts as a body to verify the legal basis or propriety of the application for judicial review, a matter of public law, where the AGC is entrusted and has a duty to act as the first filter in G sieving through the application before the substantive application is heard by the court. In fact, at the leave stage, the threshold is low, only to note whether there is sufficient basis for the application to be heard at the substantive stage (see *Dato' Sri Mohd Najib bin Tun Hj Abdul Razak v Attorney General & Ors* [2020] 3 MLJ 114).

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[93] Therefore, what are the considerations that the AGC will have in mind when the affidavit is served at its office by an applicant for judicial review? It should not consider the depth of the application on its merits as this is a matter for the court at the substantive stage. At the leave stage, the AGC normally does I and should only limit itself to considering the preliminary basis of such application so that it is not frivolous and vexatious. This includes the timing of the same and whether such application is indeed within the public law realm of judicial review in the first place. That is precisely the reason why the AGC needs to be informed of the application, although it might not be directly

concerned with the same. Thus, where the AGC did not register any objection at the leave stage, it should be safe for the court to proceed to the substantive stage and hear the application for judicial review on its merits, as what had rightly happened at the HC in this case.

[94] It should also be pointed out that in respect of this cross-appeal of the respondents, the notice of cross-appeal (encl 8) clearly stated that what is requested is that the decision of the learned HCJ be maintained. Thus, the respondents do recognise that the decision of the HC is in their favour. In view of this, they must have taken the position that the learned HCJ had given the correct decision and was not in error. That must include the decision that there was no delay by the appellant or the very least, even if there was delay, the same had not prejudiced the respondents. Hence, the respondents should not be allowed to approbate and reprobate. On one hand challenging the decision of the HC and on the other, requesting that same decision be upheld.

RELIEFS GRANTED

[95] Therefore, based on all the explanations given, we agree to grant the following reliefs as sought by the appellant:

(a) an order of certiorari to quash the decision to terminate his service made by the third respondent;

(b) an order of certiorari to quash the decision to dismiss the appellant's appeal made after the decision to terminate his service;

(c) a declaration that the decision of the third respondent to terminate his service is invalid and unenforceable;

(d) a declaration that the rejection of his appeal by the third respondent to terminate his service is invalid and unenforceable;

(e) an order that he be reinstated to his position prior to the termination of his service by the third respondent; and

(f) an order that he be paid all his salaries, emoluments and benefits from the date of termination of his service by the third respondent.

CONCLUSION

[96] There is legitimate expectation that the appellant's service will not be terminated based on public interest. From a position where the third respondent wanted to take disciplinary action to simply dismiss the appellant from service, the former had been forced to change it stance to instead terminate the appellant's service in public service.

[97] Both in the intended action to dismiss the appellant from service and the eventual termination of the appellant's service based on public interest, there are procedures incumbent on the third respondent. Largely as shown, these procedures were not followed by the third respondent. From the frying pan into the fire, all the respondents, especially the third respondent could not escape the precarious position they found themselves in, not least by the lack to think through the best possible steps before executing the action against the appellant.

[98] Based on all the reasons expounded in this judgment, we are unanimous in allowing the appeal and setting aside the learned HCJ's decision with costs for the appellant.

Appeal allowed; HCJ's decision set aside with costs for appellant.

Reported by Dzulqarnain Ab Fatar